STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE RE: INTOXICATION OR IMPAIRMENT

The State of Arizona, by and through undersigned counsel, responds to the defendant's Motion In Limine To Limit Testimony Regarding the Defendant's Intoxication or Impairment. The State requests the Court to deny the defendant's motion for the reasons set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On November 6, 1995, approximately 6:20 p.m., Officer Volden, while northbound on Interstate 17 approaching Thomas Road, observed a vehicle driven by defendant Dowrick. Dowrick's vehicle changed from lane 1 to lane 2 without signaling and then rapidly accelerated to approximately 70 M.P.H. Officer Volden paced the defendant's vehicle for approximately one-quarter mile when they approached slower traffic. During this distance, the defendant's vehicle moved to lane 3, back to lane 2, and finally into lane 1. The defendant appeared to be in a hurry and tried to pass other traffic. Four times, while following the defendant, Officer Volden observed the defendant move from side to side in lane 1. At approximately Bethany Home Road, the defendant passed two vehicles in lane 1 by moving into lane 2 and then quickly back to lane 1. Each lane change was made in a quick, jerky fashion without signaling.

When the defendant's vehicle approached Glendale Avenue, the vehicle moved quickly into lane 2 without signaling, slowed to a speed slower than surrounding traffic, and then abruptly moved into lane 3 using his right turn signal. At this point, the defendant's vehicle left Interstate 17 at Glendale Avenue, slowing to approximately 5 m.p.h., and made a right turn on to eastbound Glendale Avenue. After pacing the

defendant at 55 M.P.H. for a quarter mile, Officer Volden activated his emergency equipment near 21st Avenue. The defendant continued eastbound to a business parking lot at 1917 W. Glendale Avenue, where he pulled over and parked.

As Officer Volden approached the defendant in the vehicle, the officer observed that the defendant's eyes were bloodshot and watery. When Officer Volden asked for the defendant's driver's license, the officer detected a strong odor of alcoholic beverage on the defendant's breath and noticed that his speech was slurred. The defendant stated that he did not have his license with him and that his license was suspended. The defendant was excessively talkative and swayed two to four inches side to side while standing supported by his vehicle. He denied having been drinking.

The defendant refused to submit to the field sobriety tests. He was placed under arrest and transported to the DPS north office. He was read his *Miranda* rights and waived them. He was read the Admin Per Se/Implied Consent affidavit and refused by saying "No." While at the DPS station, the defendant talked continuously, making several statements to the effect of "I shouldn't have been driving because I was suspended." The defendant was charged with Aggravated DUI, a class 4 felony.

LAW:

The defendant claims that the court should limit the officers' testimony regarding their opinion(s) on the defendant's intoxication pursuant to *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983). As the Arizona Court of Appeals stated in *State v. Bojorquez*, 145 Ariz. 501, 702 P.2d 1346 (App. 1985), the *Fuenning* Court "did not state a *per se* rule that an officer's opinion regarding intoxication is never admissible and, if admitted, will always constitute reversible error." *Id*. at 502, 702 P.2d at 1347. Instead,

under *Fuenning*, the trial court is required to consider whether the probative value of the officer's opinion concerning the defendant's intoxication outweighs that testimony's prejudicial impact. *State v. Carreon*, 151 Ariz. 615, 616-17, 729 P.2d 969, 970-71 (App. 1986). *Carreon* went on to state, "The statement in *Fuenning* was *dicta* and did not expressly overrule existing case law allowing such testimony." *Id*. at 617, 729 P.2d at 971.

In addition, *Fuenning's* facts are distinguishable from the facts of the instant case. In *Fuenning*, the defendant was only charged with driving with an alcohol concentration of .10% or greater. *Fuenning* did not include a charge that the defendant was impaired by alcohol. In the instant case, the defendant is charged with driving while being impaired to the slightest degree by alcohol. Because the defendant refused an alcohol concentration test, there is no charge alleging that the defendant's alcohol concentration was at or above .10 %. At trial, the State will introduce evidence of the officer's training, experience, and judgment of the defendant's condition. If the officer were to be precluded from testifying that the defendant was impaired, the message to the jury would be that the officer must **not** believe that the defendant was under the influence of alcohol -- otherwise he would just say that the defendant was drunk.

Fuenning creates a fiction, and the dilemma the State faces if the defendant's motion is granted is graphically illustrated by the facts of this case. The State will call an officer to testify. That officer is trained, experienced, and in contact with impaired drivers on a weekly, if not nightly, basis. If the defendant's motion is granted, the officer will be precluded from stating his opinion that the defendant was impaired. The defendant will call two civilian witnesses, people with no special training or experience, who will both

submit that they do not know how to distinguish if a driver is impaired to the slightest degree versus a drunk driver. These two witnesses will be allowed to say that in their opinion, the defendant was not drunk. The contradiction is clear. The double standard handcuffs the officer from testifying truthfully and allows the defendant to introduce contradictory evidence in spite of his witnesses' admitted lack of knowledge, experience, or training.

Rule 704, Arizona Rules of Evidence, provides that opinion testimony is not excludable merely because it embraces an ultimate issue of fact. Rule 704 and the comment thereto state as follows:

> Opinion on Ultimate Issue Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
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> Comment:
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> Some opinions on ultimate issues will be rejected as failing to meet the requirement that they assist the trier of fact to understand the evidence or to determine a fact in issue. Witnesses are not permitted as experts on how juries should decide cases

In the instant case, the State will not introduce any evidence by police officers that violates or offends *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1984). The officer will not give any "rating" of how intoxicated the defendant was, *cf. State v. Lummus*, 190 Ariz. 569, 950 P.2d 1190 (App. 1997). Nor will the officer state that the defendant was "under the influence." The police officer will testify to his experience and training in recognizing persons who are under the influence of alcohol. He will then testify that the defendant displayed signs and symptoms of alcohol intoxication, describe the defendant's appearance and behavior, and state his conclusion that the

defendant's conduct appeared to be influenced by alcohol. *State v. White*, 155 Ariz. 452, 747 P.2d 613 (App. 1987). The officer's testimony will not violate *Fuenning* or any of its progeny.

CONCLUSION

For the foregoing reasons, the State requests the Court deny the defendant's Motion In Limine To Limit Testimony Regarding the Defendant's Intoxication or Impairment.